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No. 85-1291

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOEL LEVINE, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an order restraining the lawyers in a federal criminal trial from making public statements regarding the case violates the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A28-A98) is reported at 764 F.2d 590. The opinion and order of the district court as amended (Pet. App. A1-A27, A99-A106) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1985 and amended on August 19, 1985. A petition for rehearing was denied on November 1, 1985 (Pet. App. A107-A108). The petition for a writ of certiorari was filed on January 29, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On October 2, 1984, petitioner Miller, then a special agent with the Federal Bureau of Investigation (FBI), was

arrested and charged with espionage. On October 12, 1984, a grand jury sitting in the Central District of California returned an indictment charging Miller and co-defendants Svetlana Ogorodnikova and Nikolay Ogorodnikov with conspiring to commit espionage.[1] Pet. App. A29-A30. In particular, the indictment alleged that Miller provided the Ogorodnikovs with classified FBI information and documents for transmission to Soviet agents, and that on one occasion Miller accompanied Ogorodnikova to San Francisco, California, where she delivered classified documents to officials at the Soviet consulate.

Both the national and local press covered the criminal proceedings against Miller extensively. Pet. App. A30. Early in the proceedings, the district court learned that government officials and defense attorneys both had engaged in interviews "for attribution" with press representatives.[2] On November 6, 1984, the district court admonished the parties to "try the case here [in court] and nowhere

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[1]A superseding indictment was returned in November 1984 (Pet. App. A30).

[2]For example, on October 3, 1984, the day after Miller was arrested, the FBI in Washington issued a press release that included a statement from FBI Director William Webster describing Miller's conduct as "an aberration on the proud record of patriotic and dedicated service of thousands of [FBI] special agents throughout our history." Pet. App. A101-A102. Separately, during a press conference on another subject, Attorney General William French Smith commented briefly on Miller's arrest, stating that "[w]hen you consider that the FBI has thousands of employees, every now and then a rotten apple is bound to show up" (*id.* at A102). At the same time, the United States Attorney for the Central District of California and the Special Agent in Charge of the Los Angeles FBI office conducted a press conference at which they made available the lengthy affidavit of FBI Agent P. Bryce Christensen, which supported the government's criminal complaint.

At the time petitioners Levine and Greenberg were retained to represent Miller, shortly after the return of the initial indictment, Greenberg told a *Los Angeles Times* reporter that Miller's situation was analogous to "that old comic strip in Mad Magazine called Spy Vs. Spy[]"

else" and to refrain from making extrajudicial comments likely to result in pretrial publicity. Pet. App. A31; Gov't Motion for Restraining Order (Gov't Motion) 16, ¶ 5, *United States* v. *Miller*, Cr. 84-972(A)-Kn (C.D. Cal. filed Nov. 28, 1984).

One week later, following the return of the superseding indictment, the *Los Angeles Times* reported another interview with petitioner Greenberg, one of Miller's defense attorneys. Greenberg was quoted as stating that the government's decision to drop two charges and add others was evidence of its determination to " 'convict this guy of something[.] * * * It simply proves what we've been saying all along, and that is that the FBI's charges are a joke.' " Pet. App. A101; Gov't Motion 18.

Because defense counsel continued to make statements about the case to reporters, sometimes meeting them on the courthouse steps, the government sought an order restraining the parties, counsel and their agents from publicly commenting on the case during the pendency of the action. On December 14, 1984, the district court denied the motion. While the district judge concluded that he had the authority to enter such an order, he declined to do so because trial counsel had shown a willingness to cooperate with the court's informal request to refrain from making statements to the press. Pet. App. A31; Gov't Ex Parte Application to Renew Motion for Restraining Order (Gov't Renewed Motion), Exh. 1, at 9-10, *United States* v. *Miller*, Cr.

(Pet. App. A100). Greenberg stated that Miller, who had been assigned to foreign counter-intelligence matters, had been attempting to snare the Ogorodnikovs when he himself was arrested. Greenberg also disputed other matters alleged in Agent Christensen's affidavit and the indictment. See Gov't Motion for Restraining Order 19, *United States* v. *Miller*, Cr. 84-972(A)-Kn (C.D. Cal. filed Nov. 28, 1984); Pet. 7. According to the newspaper account, FBI officials declined to comment on Greenberg's statements.

84-972(A)-Kn (C.D. Cal. filed Mar. 4, 1985). In response to the statement of one of Ogorodnikova's lawyers that the defense attorneys might "at some future time deem it necessary in the interest of our client to make a statement outside the courtroom," the district judge observed that "[t]he role of the lawyer * * * is to promote a side in the courtroom and not to be a publicity person for someone." In the trial judge's view, talking to the press about the case could only amount to an attempt "to persuade the potential trier of fact" outside the courtroom; the judge expressed the view that any attempt by counsel "to try and create an atmosphere in which a fair trial cannot be had, for either side," was professionally unethical. Pet. App. A31-A32; Gov't Renewed Motion, Exh. 1, at 9, 12-14.

On January 22, 1985, the district court severed the trials of Miller and the Ogorodnikovs and, at the defendants' request, ordered the Ogorodnikovs' trial to precede Miller's. On March 3, 1985, sixteen days before jurors were scheduled to appear for selection for the Ogorodnikov trial, the *Los Angeles Times* published an article containing extensive statements attributed to defense counsel, including Greenberg. Pet. App. A32-A35; Gov't Renewed Motion, Exh. 2. The lawyers' comments focused on the prosecution's decision to drop four counts of aiding and abetting espionage against the Ogorodnikovs; one of Ogorodnikova's lawyers commented that the dismissal means "the government has now conceded that no documents were ever passed" (Pet. App. A33). Remarking on the government's motives in bringing the case against Miller, Greenberg was quoted as asserting that "the FBI misled the U.S. attorney's office about the strength of the case until it was too late" (*id.* at A34). The defense attorneys also provided a detailed account of the defendants' theory of the case, including descriptions of the testimony expected from certain defense witnesses. See *id.* at A32-A35. According to the newspaper

account, "[a] federal prosecutor declined to respond to the comments on grounds that a judge has asked all parties in the case to avoid public discussion of the evidence" (*id.* at A33).

2. After the appearance of the March 3 *Los Angeles Times* article, the government renewed its application for an order restraining extrajudicial statements. Pet. App. A35-A36. At a March 5, 1985, hearing on the motion, the district court expressed "dismay" at the level of publicity (*id.* at A5) in the case and rejected as "completely unpersuasive" the justifications offered by the defense attorneys for their decision to speak to the press (*id.* at A6).[3] The court also found that "the recent publicity that has occurred as the [trial] date is practically upon us has been instigated by counsel for defendants and seriously threatens to bias the jury pool" (*id.* at A2-A3), thus "creat[ing] a serious and imminent threat to the administration of justice in this case" (*id.* at A7). And the court noted its "affirmative constitutional duty to minimize the detrimental effects of pretrial publicity upon the potential jury pool" (*id.* at A8).

In determining whether these circumstances justified judicial action, the court explained that a restraining order imposed upon trial participants differs in kind from a prior restraint imposed directly on the press, of the sort that was at issue in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976) (Pet. App. A3). The court nevertheless decided to apply the stringent test set out in *Nebraska Press Ass'n* (Pet. App. A8-A9). In doing so, the court found that the level of publicity about the Miller case presented a "serious and imminent threat" to "a fair trial before an unbiased jury"

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[3]Defense counsel asserted that they had made their public statements to rebut alleged inaccuracies in a New York newspaper account (Tr. 5, 9). None of the comments made to the *Los Angeles Times*, however, addressed the subjects of the alleged inaccuracies.

(*id.* at A11-A12), a problem that was compounded by the imminence of trial (*id.* at A12). Relying on *Nebraska Press Ass'n* and *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), the district court also found that prophylactic measures short of a restraining order would not adequately counteract the prejudicial effects of pervasive pretrial publicity (Pet. App. A14-A21).[4]

The court accordingly concluded that "restraining counsel and their agents from making extra-judicial statements concerning the case is the most effective and least drastic solution to prevent the dangers inherent in counsels' comments" (Pet. App. A21). The court therefore ordered the attorneys and their agents to refrain from making "any statements to members of the news media concerning any aspect of this case that bears upon the merits to be resolved by the jury" (*id.* at A23).[5]

3. On April 12, 1985, six weeks after the restraining order was issued, petitioners sought a writ of mandamus to compel the district court to dissolve the restraining order. The

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[4]The court explained that the use of voir dire to exclude biased jurors would be ineffective (Pet. App. A17-A18), particularly given the defense attorneys' assertion that they were ethically obligated to generate pretrial publicity favorable to their clients; the attorneys' position meant that, absent measures by the court to curb comments by counsel, "prejudicial extrajudicial comments [would] continue during trial and voir dire is powerless to neutralize such prejudicial publicity" (*id.* at A19). Similarly, the court found that a change of venue or postponement would not obviate the problem because "[h]ere the problem is with curbing unwarranted statements by counsel, and a change of venue or postponement would simply have no effect on the problem" (*ibid.*). And the court concluded that jury instructions would be inadequate to assure a fair trial, finding that "the reasonably anticipated barrage of prejudicial publicity will poison the impartiality of a jury, even with such limiting instructions" (*id.* at A20).

[5]In its original form, the district court's order also restrained the parties and witnesses from making public statements about the case (Pet. App. A23-A24). The court subsequently modified the order sua sponte to exclude these persons from its reach (*id.* at A26).

court of appeals granted the petition for mandamus and directed the district court to define the scope of its restraining order more narrowly (Pet. App. A28-A98).

At the outset, the court of appeals noted that the district court's order "neither denies the media access to any criminal proceeding nor bars the media from disseminating any information that it obtains" (Pet. App. A42-A43).[6] The court concluded, however, that the order amounted to a prior restraint on petitioners' speech (*id.* at A46), and that it could be upheld only upon a showing that (1) the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest; (2) the order is narrowly drawn; and (3) less restrictive alternatives are not available (*id.* at A47).

Citing *Nebraska Press Ass'n, Sheppard*, and decisions from other circuits, the court of appeals found that the district court's order largely satisfied that test (Pet. App. A48-A53). The court affirmed the district judge's finding that pretrial publicity in this case posed "a serious and imminent threat to the administration of justice" (*id.* at A59), noting that "[e]ven if an impartial jury could be

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[6]The court of appeals left open the question whether the restraining order violated "the first amendment by impairing the media's ability to gather news" (Pet. App. A44); the court noted that "none of the media organizations that could be affected by the district court's order have joined this action" (*id.* at A45), and it held that petitioners lacked standing to challenge an asserted infringement of the press's rights. The Radio and Television News Association of Southern California (RTNA) subsequently sought a writ of mandamus from the court of appeals challenging the order. On February 10, 1986, the court of appeals denied that application. *Radio & Television News Ass'n* v. *United States District Court*, 781 F.2d 1443 (9th Cir.). The court of appeals reasoned that because the district court's order restricts trial counsel and not the press, RTNA's right to gather and disseminate news has not been restrained. The court of appeals also held that the public has no First Amendment right to hear from trial participants.

selected, intense prejudicial publicity during and immediately before trial could allow the jury to be swayed by extrajudicial influences" (*id.* at A63; see *id.* at A64-A66). The court of appeals also affirmed the conclusion that less restrictive prophylactic alternatives would be insufficient to ensure the integrity of the judicial process (*id.* at A71-A79).

Although the court of appeals found a restraining order to be justified in this case, it held that the district court's order was overbroad. The court concluded that many statements bearing upon the merits of the case, which would be barred by the district court's order, would pose no threat to the administration of justice (Pet. App. A68). The court of appeals therefore directed the district court to narrow its restraining order in accordance with the appellate court's opinion (*id.* at A79).

In fashioning a narrow order, the court of appeals suggested, the district court should consider holding the government to the limitations on extrajudicial comments imposed by 28 C.F.R. 50.2(b). As for defense counsel, the court listed six categories of statements that might appropriately be proscribed: those relating to (1) the character, credibility, or reputation of a party; (2) the identity or expected testimony of a witness or party; (3) the contents of any pretrial statement; (4) the nature of physical evidence; (5) the strengths or weaknesses of either party's case; and (6) any other information that the lawyer knows to be inadmissible as evidence that would create a substantial risk of prejudice if disclosed. Pet. App. A69-A70. The court of appeals directed the district court, on remand, to fashion an order specifying the proscribed types of statements (*id.* at A68-A69, A79).[7] The district court has since entered such

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[7]Judge Sneed concurred, emphasizing that "the conduct of lawyers should eliminate the necessity of imposing [restraining] orders" (Pet. App. A80). Judge Nelson concurred in part and dissented in part; she accepted the court's statement of the applicable legal standard, but

an order, limiting the prohibitions of the restraining order to the six specific categories of statements listed by the court of appeals (*id.* at A99-A106).[8]

ARGUMENT

1. Petitioners' principal contention (Pet. 24-35) appears to be that the court of appeals' decision cannot be reconciled with *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976). In fact, however, this case involves a restraining order that is wholly different in nature from the one at issue

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concluded that the record here does not "reflect[] an adequate showing of a 'clear and present danger or a serious and imminent threat' to the empaneling of an impartial jury in this case" to justify the issuance of a restraining order (*id.* at A90).

[8]The Ogorodnikovs' trial began in April 1985. They pleaded guilty some two months later. Jury selection for Miller's trial began on July 26, 1985; the court declared a mistrial on November 6, 1985, when the jury was unable to reach a verdict. Jury selection for Miller's second trial began on February 13, 1986, and the trial is now underway. We note that the restraining order will expire upon the termination of trial (see Pet. App. A23-A24), and that petitioners' challenge to the order will, at that point, become moot. Petitioners cannot bring themselves within the "capable of repetition, yet evading review" exception to the mootness doctrine. To do so, they would have to demonstrate not only that the challenged order was too short in duration to be fully litigated prior to its termination, but also that there is "a reasonable expectation that the *same complaining party* [will] be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (emphasis added). Petitioners, however, have not suggested that they regularly are subjected to restraining orders by federal district courts, and they have offered nothing to demonstrate "a 'reasonable expectation' or a 'demonstrated probability' " that they will be involved in the "same controversy" in the future. *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982). *Nebraska Press Ass'n* does not lead to a different conclusion; there, the Court found it likely that the same dispute would arise in the future between the state and the press. 427 U.S. at 546-547; see *Murphy*, 455 U.S. at 483 & n.8. Representatives of the press, however, are not parties to this action, so the possibility that the press may have cause to complain of restraining orders against other lawyers in other criminal cases in the future cannot be invoked to avoid a finding of mootness upon the conclusion of Miller's trial.

in *Nebraska Press Ass'n*. There, the Court set aside an order that directly restrained the press from publishing trial-related materials, noting that challenges to prior restraints of that sort present the most compelling First Amendment claims. See 427 U.S. at 556-560. Here, in contrast—as both courts below took pains to explain—the order at issue imposes restraints only on certain of the trial participants. It leaves the press free to publish whatever information it obtains. See *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 9 (1978) (opinion of Burger, C.J.); *Pell* v. *Procunier*, 417 U.S. 817, 834 (1974).

This Court's decisions leave little doubt that trial judges have the authority to issue such limited restraining orders when necessary to guarantee the integrity of the judicial process. In *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), for example, where the Court reversed a conviction that had been tainted by extensive extrajudicial publicity, the Court found it "obvious that the judge should have * * * impos[ed] control over the statements made to the news media by counsel" (*id.* at 360). See *id.* at 359. The Court suggested that the trial court "might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters." The "control of these sources," the Court stated, was "concededly within the [trial] court's power" (*id.* at 361). Indeed, the Court concluded that "[c]ollaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures" (*id.* at 363).

Similarly, in *Nebraska Press Ass'n* itself, the Court reaffirmed *Sheppard*'s conclusions on this point (427 U.S. at 553-554, 564), and cited with approval the recommendations of bar association groups "that trial courts in appropriate cases limit what the contending lawyers, the police,

and witnesses may say to anyone" (*id.* at 564).[9] In his concurring opinion, Justice Brennan made the same point even more explicitly:

> As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice. It is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases, see *In re Sawyer*, 360 U.S. 622 (1959), and to impose suitable limitations whose transgression could result in disciplinary proceedings.

Nebraska Press Ass'n, 427 U.S. at 601 n.27 (Brennan, J., concurring in the judgment).

Contrary to petitioners' contentions (Pet. 16, 28), every court of appeals that has considered the question also has upheld the authority of trial courts to impose restraints on statements by trial participants when necessary to ensure a fair trial. See *In re Russell*, 726 F.2d 1007 (4th Cir. 1984), cert. denied, No. 83-6543 (Oct. 1, 1984) (reasonable expectation of inflammatory and prejudicial statements from potential witnesses justified order restraining them from discussing proposed trial testimony with press); *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242, 249 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976) (approving bar

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[9]Petitioners, citing 427 U.S. at 564 n.8, suggest (Pet. 26) that the Court in *Nebraska Press Ass'n* left open the question whether courts have the authority to impose restraints on lawyers in criminal cases. In fact, the Court simply declined to discuss the question whether such restraints implicate the First Amendment rights of the press. The Court nowhere suggested that the constitutional rights of trial participants may be infringed when the participants are subjected to restraints such as the ones imposed in this case.

association ethical rules and local district court rules forbidding lawyer contacts with the press that pose a " 'serious and imminent threat' " of interference with a fair trial); *Farr* v. *Pitchess*, 522 F.2d 464, 468-469 (9th Cir. 1975), cert. denied, 427 U.S. 912 (1976) (acknowledging authority of district courts to restrict extrajudicial speech of parties, lawyers, and court personnel); *United States* v. *Schiavo*, 504 F.2d 1, 6 (3d Cir.) (en banc), cert. denied, 419 U.S. 1096 (1974)(same); *United States* v. *Tijerina*, 412 F.2d 661 (10th Cir.), cert. denied, 396 U.S. 990 (1969) (affirming criminal contempt conviction for violation of an order restraining defendants from making extrajudicial comments about their case where the order was based on a reasonable likelihood of interference with a fair trial). Cf. *In re San Juan Star Co.*, 662 F.2d 108, 113-118 (1st Cir. 1981) (upholding a protective order in a civil case forbidding disclosure of deposition evidence to members of press or public because prejudicial publicity might make empaneling of an impartial jury impossible); *United States* v. *Norris*, 780 F.2d 1207, 1211-1212 (5th Cir. 1986) (affirming conviction over defendant's claim that he was prejudiced by an order prohibiting public comment by trial participants).[10]

2. Petitioners' complaints here are particularly unpersuasive in light of the extraordinary measures the lower courts took to narrow the scope of the restraining order. Despite their observations that the challenged order did not impose a restraint on the press, both courts below chose to safeguard petitioners' rights by applying the stringent *Nebraska Press Ass'n* test. While petitioners appear to

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[10]Petitioners' contention (Pet. 33) that the court of appeals' ruling conflicts with *Chase* v. *Robson*, 435 F.2d 1059 (7th Cir. 1970), is without merit. *Chase* simply held that a particular restraining order was overbroad and not supported by the record. See *id.* at 1061. Implicit in the decision was the conclusion that an appropriately limited order would be constitutional. That conclusion was confirmed by the Seventh Circuit's subsequent decision in *Chicago Council of Lawyers*.

acknowledge this point (Pet. 20), they assert that the courts below erred by failing to make specific findings about the prejudicial effects of pretrial publicity (Pet. 18-19, 22-23, 34-35) and by basing the restraining order on "the mere fact of attorney comments" (Pet. 22).

These assertions are inaccurate. The district court expressly found that the extensive pretrial publicity in this case was threatening "to bias the jury pool" (Pet. App. A2-A3, A6, A9). The district court also found that the anticipated barrage of publicity immediately prior to and during trial would make a fair proceeding impossible (*id.* at A12-A13, A19). And the district court extensively examined the alternatives to a restraining order (*id.* at A14-A22), concluding that none would effectively guarantee a fair trial. That conclusion hardly required speculation on the court's part, as petitioners suggest (Pet. 34-35): defense counsel had announced that they believed themselves to be ethically obligated to generate publicity favorable to their clients (see Pet. App. A5, A10).[11] The court of appeals affirmed each of these specific factual findings by the district court. The record before the district court amply supported those findings, and, in any event, those factual determinations do not warrant review by this Court.

Petitioners' challenge to the six categories of statements that the court of appeals found properly proscribed is similarly without merit. While petitioners maintain (Pet. 51-54) that the court erred by referring to ethical guidelines in developing its standards, this Court has indicated that the

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[11]Petitioners' contention that they had a right and duty to make public statements on behalf of their clients—a claim that they restate before this Court (Pet. 46-50)—has repeatedly been rejected: " 'The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.' " *Sheppard*, 384 U.S. at 351 (quoting *Patterson* v. *Colorado*, 205 U.S. 454, 462 (1907)).

consideration of such guidelines is appropriate in the formulation of orders such as the one at issue here. *Nebraska Press Ass'n*, 427 U.S. at 564 & n.8. Petitioners' further suggestion that the categories are overbroad (Pet. 54-56) simply disregards the court of appeals' efforts to tailor the order narrowly; it is difficult to imagine how the court could have devised more precise standards for "proscrib[ing] extrajudicial statements by any lawyer * * * which divulge[] prejudicial matters." *Sheppard*, 384 U.S. at 361. See *Nebraska Press Ass'n*, 427 U.S. at 601 (Brennan, J., concurring in the judgment).

3. Finally, petitioners maintain that the restraining order in this case impairs the First Amendment rights of the press to gather information (Pet. 36-46) and that they have standing to challenge that impairment (*id.* at 56-59). These contentions were properly rejected by the court of appeals. Even granting petitioners' implausible assertion that the press has a First Amendment right to obtain a particular lawyer's views about the course of an ongoing criminal proceeding, petitioners have no standing to advance such a claim.

The general standing rule articulated by this Court is that, "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, * * * the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). While the Court has recognized exceptions to this rule—as the court of appeals recognized (Pet. App. A45)—none of those exceptions is applicable here. There is no legal relationship between petitioners and members of the press. See *Warth*, 422 U.S. at 510. And petitioners have not suggested that members of the press "are disabled from asserting their own right in a proper case" (*ibid.* (footnote omitted)). To the contrary, as is noted above (at note 6, *supra*), the Radio and Television News Association of Southern California

(RTNA) itself sought a writ of mandamus from the court of appeals, arguing that the district court's restraining order violated the First Amendment. That contention was rejected by the court of appeals. *Radio & Television News Ass'n* v. *United States District Court*, 781 F.2d 1443 (9th Cir. 1986). If that ruling is to be challenged in this Court, the challenge should be brought by the RTNA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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